damages, because it is "well within the 'single digit ratio' that marks the outer limits of permissible disparities" under *State Farm*).

Further, the Ninth Circuit has interpreted *State Farm* to allow "a ratio of up to 4 to 1 [to] serve[] as a good proxy for the limits of constitutionality," even when "there are significant economic damages and * * * [the] behavior is not particularly egregious." *Planned Parenthood v. American Coalition of Life Activists*, 422 F.3d 949, 962 (9th Cir. 2005). Thus, that court has held that "*State Farm*'s 1:1 compensatory to punitive damages ratio is not binding, no matter how factually similar the cases may be." *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1015 (9th Cir.), *cert. denied*, 542 U.S. 939 (2004).[6]

In addition to the decision below, other California state appellate decisions have engaged in the same misreading of *State Farm*. Thus in *Maya B. v. Vogel*, 2004 WL 551325 (Cal. Ct. App. Mar. 22, 2004), the court of appeal held that a punitive damages award of $1.6 million was "not in itself excessive" despite the fact that it was "two times the amount of compensatory damages" because "the single-digit multiplier was well within the discretion of the jury and trial court." *Id.* at *13; *see Romo v. Ford Motor Co.*, 6 Cal. Rptr. 3d 793, 812 (Cal. Ct. App. 2003) (sustaining multimillion dollar punitive damages award that was more than five times the compensatory damages award for wrongful death suits arising out of rollover accident). Appellate courts from other States have likewise reached the same erroneous result and sustained large single-digit ratios without explanation. *See, e.g., Kentucky Kingdom Amusement Co. v. Belo Kentucky, Inc.*, 2005 WL

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[6] Other federal courts have likewise made the same analytic error of viewing single-digit ratios as a safe harbor even when the plaintiff was awarded substantial compensatory damages. *See, e.g., Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 345 F.3d 1366, 1372 (Fed. Cir. 2003); *Bogle v. McClure*, 332 F.3d 1347, 1362 (11th Cir. 2003); *Chicago Title Ins. Corp. v. Magnuson*, 2005 WL 2373430, at *11 (S.D. Ohio Sept. 26, 2005).

2043633, at *2, *6 (Ky. Aug. 25, 2005) (sustaining $2.5 million punitive damages award in favor of a defamed corporation that was five times the $475,000 compensatory damages award).

3. The California Court of Appeal's decision below disparaged the relevance of the substantial amount of $5.5 million in compensatory damages awarded to the plaintiff here, asserting that a larger amount of compensable injury does not entitle a defendant to receive what the court viewed as greater due process protection. Pet. App. 68a. In reaching that conclusion, that court ignored the relationship between compensatory and punitive damages acknowledged by this and other courts and disregarded the fact that the substantial, but not excessive, punitive damages allowed under a proper reading of *State Farm* can sufficiently deter and punish defendants.

In *State Farm*, this Court held that at least one component of compensatory damages, those awarded for emotional distress, "already contain this punitive element" by their nature. 538 U.S. at 426. As explained in one particularly scholarly district court opinion, all compensatory damages "possess a deterrent and punitive aspect," because "insofar as the compensatory award reflected some measure of imprecision and uncertainty always inherent in computations of damages, * * * Defendants must bear the risk of that deficiency, a burden that constitutes a built-in deterrent aspect of compensatory damages." *TVT Records v. Island Def Jam Music Group*, 279 F. Supp. 2d 413, 424, 451 (S.D.N.Y. 2003), *rev'd on other grounds*, 412 F.3d 82 (2d Cir. 2005).

The decision below also disregarded the fact that, in an absolute sense, punitive damages that are equal to compensatory damages will be substantial whenever the compensatory damages are substantial, and thus are likely to serve their legitimate deterrent and punitive functions at that level. In this case, a punitive damages award equal to the extraordinary $5.5 million compensatory damages awarded a single plaintiff can hardly be viewed as insubstantial. *See Williams*, 378 F.3d

at 799 (reducing punitive damages award to equal substantial compensatory damages award and noting that "[s]ix hundred thousand dollars is a lot of money"); *Watson v. E.S. Sutton, Inc.*, 2005 WL 2170659, at *19 (S.D.N.Y. Sept. 6, 2005) (reducing punitive damages award from $2.5 million to $717,000, which was approximately 50% of the compensatory damages award because "the amount is substantial enough to deter, while not being unduly burdensome"). By contrast, a jury decision to augment many times over a substantial compensatory damages award (like the initial jury award of $3 billion in punitive damages in the instant case before judicial review) serves as a "telltale sign[]" that the jury's verdict "may have been tainted by the jury having given undue weight to secondary considerations such as Defendants' wealth, or to impermissible factors such as prior 'dissimilar acts, independent from the acts upon which liability was premised,' or Defendant's affiliations with large and rich parent companies or out-of-state businesses." *TVT Records*, 279 F. Supp. 2d at 451 (footnote and citations omitted).

B. The Decision Below Ignores *State Farm*'s Holding And Rationale By Upholding A Punitive Damages Award Based On Alleged Harms To Individuals Not Parties To The Case

1. The error of the California Court of Appeal below in applying the single-digit safe harbor is compounded by that court's failure to apply correctly the first *State Farm* guidepost, which requires an assessment of the degree of reprehensibility of the defendant's conduct. The court below allowed alleged harms to persons who were not before the trial court to form part of the basis for the punitive damages award.

But this Court made clear in *State Farm* that not only does the Due Process Clause impose territorial limits on the conduct that may be considered by a jury, but also basic notions of procedural due process preclude a jury from awarding punitive damages for harm caused to

persons who are not parties to the particular action. "Due process," the Court explained, "does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis." 538 U.S. at 423; *see id.* at 421 ("[a]ny proper adjudication of conduct that occurred * * * to other persons would require their inclusion").

Yet that is precisely what occurred in this case. The Court of Appeal plainly relied on harm to other individuals, both smokers and non-smokers, in assessing reprehensibility but declined to require respondent to identify the specific individuals harmed, to demonstrate that those individuals were harmed by the same punishable conduct that underlay respondent's harms, or to establish that petitioner would be legally liable to those particular individuals. Pet. App. 63a-64a. In a similar situation arising in the Eighth Circuit, Judge Bye concurred in the invalidation of a punitive damages award against a tobacco company because "such evidence can not be considered when determining the amount of punitive damages for the specific harm suffered by a plaintiff." *Boerner*, 394 F.3d at 606 (Bye, J., concurring in result).

2. This due process limitation on imposing punishment for unadjudicated nonparty harms protects the rights of both defendants and the persons who are not before the court. If harm to nonparties could be considered in the cases of other individual plaintiffs, there is a substantial risk "of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains." *State Farm*, 538 U.S. at 423. As petitioner notes (Pet. 15), that is more than a hypothetical concern in the arena of tobacco litigation, where other California juries have awarded other individual plaintiffs substantial punitive damages awards against petitioner based on the same harms to the same set of nonparty individuals. In essence, consideration of harm to nonparties permits each individual plaintiff to recover on behalf of a class.

Even were defendants to get an offset in subsequent cases for earlier punitive damages awards, the exact basis for a prior punitive damages award will not always be clear. And even where it is proven that the defendant has already been punished severely for a course of conduct that included harm to the current plaintiff, there is no guarantee that the jury would agree to deny a different plaintiff who is before that jury in a different suit recovery of punitive damages simply because another plaintiff, in another court, already may have recovered such damages. *See Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 840 (2d Cir. 1967) (Friendly, J.) ("whatever the right result may be in strict theory, we think it somewhat unrealistic to expect a judge, say in New Mexico, to tell a jury that their fellow townsman should get very little by way of punitive damages because Toole in California and Roginsky and Mrs. Ostopowitz in New York had stripped that cupboard bare, even assuming the defendant would want such a charge, and still more unrealistic to expect that the jury would follow such an instruction or that, if they didn't, the judge would reduce the award below what had become the going rate").

Permitting an aggregate recovery followed by offsets in future cases could, moreover, unfairly deprive subsequent claimants of their own recoveries, including compensatory damages, either as a matter of law or because the pool of money available to those subsequent plaintiffs will be substantially reduced by the recovery of the initial plaintiff. *Cf. Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 834-842 (1999) (discussing judicial responses to "limited fund" situations in class actions).

In all these circumstances, it is difficult, if not impossible, for defendants to rebut divergent charges about what happened to persons not before the court because of a myriad of evidentiary and practical issues. That is especially true given the constraints that trial courts must necessarily impose to make jury trials manageable. *See* 2 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 403.06[2] (2d ed. 2005).

Furthermore, even where a defendant prevails and establishes in an initial suit that it is not liable to a particular plaintiff, it is possible that such a defendant could lose the benefit of that victory against the same claim of misconduct as a basis for a punitive damages award in a later case because the prior verdict would not bind the later jury in its determination of punitive damages. Likewise, where a defendant prevails and is found not legally liable in some or most later suits involving similar claims there is no means for that defendant to recoup whatever portion of any earlier punitive damages award in another case was based on the alleged harm for which the defendant is later found not responsible.

The California Court of Appeal's decision to permit a jury to consider the effect of petitioner's conduct on persons not before the court essentially deputizes the presumably well-meaning but inexpert individuals serving on the jury to act as *de facto* regulators with the authority to impose monetary penalties far greater than the State has authorized to be imposed by its own expert state regulators. Pet. App. 71a-72a. And, significantly, the jury's vote to award punitive damages in this case was not unanimous. The plaintiff mustered the bare minimum of votes necessary under California law, with a vote of 9 to 3. Yet those nine individuals voted to award the single plaintiff here $3 billion in punitive damages against a single defendant. Even after the reduction to $50 million, that punitive damages award will supplant all other state regulation in the eyes of defendants. *Cf. Geier v. American Honda Motor Co.*, 529 U.S. 861, 871 (2000) (describing effect of jury verdicts as akin to regulation).

When faced with the threatened risk of financial exposure from such a punitive damages award based on alleged harm to persons or entities not before the court, defendants are often subject to heightened (and unjustified) pressure to settle cases regardless of the likelihood of winning or losing the case on liability against a particular plaintiff. Such an approach "'over-deter[s]' by leading potential defendants to spend more to prevent the

activity that causes the economic harm * * * than the costs of the harm itself," *Gore*, 517 U.S. at 593 (Breyer, J., concurring), and thus potentially "dissuad[es] activities commercially or socially beneficial on account of excessive caution induced among some corporate managers by fear of disproportionate punitive liability." *TVT Records*, 279 F. Supp. 2d at 429.

CONCLUSION

For the reasons set forth above and in the petition for a writ of *certiorari*, the Court should grant the petition.

Respectfully submitted,

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December 15, 2005

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No. 05-594

IN THE

Supreme Court of the United States

PHILIP MORRIS USA,
Petitioner,

v.

JUDY BOEKEN, AS TRUSTEE, ETC.,
Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amicus curiae addresses the following question only:

Whether, despite this Court's holding that the Federal Cigarette Labeling and Advertising Act (15 U.S.C. §§ 1331 *et seq.*) preempts state law "failure to warn" claims, States may use a "consumer expectations" theory to impose liability for failure to provide warnings about the dangers of smoking beyond the warnings mandated by Congress.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 States.[1] WLF devotes a substantial portion of its resources to defending free-enterprise, individual rights, and a limited and accountable government. To that end, WLF has frequently appeared as *amicus curiae* in this and other federal courts in cases involving preemption issues, to point out the economic

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

inefficiencies created when multiple layers of government seek simultaneously to regulate the same business activity. *See, e.g., Bates v. Dow AgroSciences LLC*, 125 S. Ct. 1788 (2005); *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001); *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000); *United States v. Locke*, 529 U.S. 89 (2000).

WLF is particularly concerned that individual freedom and the American economy both suffer when state law, including state tort law, imposes upon industry an unnecessary layer of regulation that frustrates the objectives or operation of federal regulatory programs. Such programs include the Federal Cigarette Labeling and Advertising Act (the "Labeling Act"), which is intended to promote uniformity in cigarette labeling/advertising regulation and to reinforce First Amendment values and, consequently, commercial free speech rights by limiting state and local power to restrict commercial speech.

WLF believes that both of the issues raised by the Petition are worthy of the Court's review. Nonetheless, this brief focuses solely on the first Question Presented, regarding the California Court of Appeal's preemption ruling.

WLF has no direct interest, financial or otherwise, in the outcome of this case. It is filing due solely to its interest in the important preemption issues raised by this case. WLF is filing this brief with the consent of all parties. The written consents have been lodged with the Clerk of the Court.

STATEMENT OF THE CASE

Respondent Richard Boeken died of lung cancer after smoking, for more than 40 years, cigarettes manufactured by Petitioner Philip Morris USA ("PM USA") and its predecessors.

Before his death, he filed suit against PM USA seeking damages for common-law fraud and product liability. He argued, *inter alia*, that Marlboro Lights were not as safe as he and other ordinary consumers expected and thus that PM USA should be held strictly liable under a product liability theory.

The jury returned a general verdict in favor of Respondent, awarding $5.5 million in compensatory damages and $3 billion in punitive damages. The trial court reduced the punitive damages award to $100 million but otherwise upheld the jury award. Pet. App. 155a-181a.

The California Court of Appeal reduced the punitive damages award to $50 million but affirmed the liability verdict. *Id.* 1a-78a. Although Respondent had raised several product liability theories at trial, the Court of Appeal said that the verdict could be affirmed on basis of the "consumer expectations test." *Id.* 28a. The court explained, "The consumer expectations test is satisfied when the evidence shows that 'the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner.'" *Id.* 28a-29a (quoting *Barker v. Lull Engineering Co.*, 20 Cal. 3d 413, 429 (1978)). The court said that "substantial evidence" supported the finding that Marlboro Lights were a defective product under that test. *Id.* 28a. The Court said that "most smokers" believe that Marlboro Lights are safer than ordinary cigarettes because, when they are smoked the same way as ordinary cigarettes, less tar is inhaled (as measured by Federal Trade Commission-approved standards). *Id.* at 29a. The Court held that substantial evidence supported Respondent's claim that Marlboro Lights smokers generally inhale as much tar as smokers of ordinary cigarettes. Respondent's evidence suggested that that result is due to "compensation": the tendency of smokers to draw more smoke

into their lungs and to keep it there longer when smoking "light" cigarettes. *Id.*

The court rejected PM USA's contention that Respondent's claim under the consumer expectations test was preempted by the Labeling Act. *Id.* Although apparently conceding that the Labeling Act would have preempted any failure-to-warn claim raised by Respondent, the court said that Respondent's product liability claim was not preempted because "[p]roduct liability under a failure-to-warn theory is a distinct cause of action from one under the consumer expectation test." *Id.* The court also said that additional warnings could not have made Marlboro Lights any safer because "the only way to reduce the risk is to quit smoking." *Id.*

The California Supreme Court denied PM USA's petition for review on August 10, 2005.

REASONS FOR GRANTING THE PETITION

This case presents an issue of exceptional importance to thousands of companies throughout the United States: whether their activities should be regulated on a uniform basis nationwide by the federal government, or whether they are subject to a different set of regulations in each State in which they operate. Through its adoption of a variety of statutes, Congress has made clear its intent that certain industries should be subject to uniform regulation with respect to what they should and should not say to consumers, and that State regulation of that subject matter be preempted. The decision below applied a very narrow reading to federal preemption and thereby threatens to undermine the national uniformity Congress sought to achieve. Review is warranted in light of the importance of this preemption issue to the ability of the businesses to operate on a nationwide basis.

Review is also warranted because of the frequency with which the Question Presented arises, under the Labeling Act and similar statutes. At least half of the 50 States apply some form of the "consumer expectations test" to determine whether a manufacturer can be held strictly liable in tort for manufacturing a defective product. In determining just what "consumer expectations" are, most of those States look to statements of the product manufacturer. The California Court of Appeal was correct that a product liability cause of action that proceeds under the "consumer expectations test" is a separate cause of action from a "failure to warn" cause of action; that is true both in California and elsewhere. But the Court of Appeal went on to conclude that because a "consumer expectations test" claim is a distinct cause of action, such a claim is not subject to the same federal preemption limitations as is a "failure to warn" claim. Pet. App. 29a. That position is a well-entrenched minority position, albeit it is one that has been rejected by a clear majority of State and federal courts that have considered the issue. Because the application of federal preemption provisions to state-law product liability claims applying the "consumer expectations test" is an issue that arises frequently and that has divided the lower courts, review is warranted to resolve that conflict.

Review is also warranted because the decision below is so clearly at odds with the decisions of this Court that have addressed federal preemption c[illegible]. In both *Cipollone v. Liggett Group, Inc.*, 505 U.S. 5[illegible]4 (1992), and *Bates v. Dow AgroSciences LLC*, 125 S. Ct. [illegible]88 (2005), the Court made clear that in determining whether a common law cause of action is one that Congress intended to preempt, courts should examine the common law duty being imposed by that cause of action. When, as here, the common law duty is one that Congress intended to bar States from imposing, the cause of action is preempted. The California Court of Appeal never engaged in